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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN J. FINN, PETITIONER

v.

SHEILA H. FINN

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTIONS PRESENTED

1. Whether the courts below denied petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by arbitrarily and discriminatorily ordering petitioner to pay his former wife $50.00 per week in alimony and $50.00 per week per child in child support for the two minor children.

2. Whether petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States when, owing to an arbitrary and explicitly sexually discriminatory State Court Rule, petitioner was denied a stay of a court order pertaining to child support and alimony and was thereafter incarcerated for being in contempt of court.

28 U.S.C. Sec. 2403(b) may be applicable.

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John J. Finn, your petitioner, prays that a writ of certiorari issue to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The opinions of the Maine Supreme Judicial Court are reported at 499 A.2d 1234 (Me.1985) and 517 A.2d 317 (Me.1986). They are reproduced in Appendix A to this Petition.

The opinions of the Maine Superior Court for Kennebec County in this case are unreported. They are reproduced in the appendix hereto.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on November 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides in relevant part

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Title 19, Section 721 of the Maine Revised Statutes provides:

> "The court may decree to either spouse reasonable alimony out of the estate of the other spouse, having regard to that spouse's ability to pay and may order that spouse to pay sufficient money for the defense or prosecution of hearings regarding alimony. To effect the purposes of this section, the court may order so much of one spouse's real estate, or the rents or profits thereof, as is necessary to be assigned or set out the other spouse for life. The court may order instead of alimony, a

specific sum to be paid or to be payable in such manner and at such times as the court may direct. The court may at any time alter, amend or suspend a decree for alimony or specific sum when it appears that justice requires it; except that a court may not increase the alimony if the original decree prohibits an increase. The court may use all necessary legal processes to carry its decrees into effect.

"This section shall not limit the court, by full or partial agreement of the parties or otherwise, from awarding alimony for a limited period, from awarding alimony which may not be increased regardless of subsequent events or conditions, or otherwise limiting or conditioning the alimony award in any manner on terms that the court deems just."

3. Title 19, Section 752(7) of the Maine Revised Statutes provides:

"The court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's sex or the child's age or sex."

4. Rule 62(a) of the Maine Rules of Civil Procedure provides:

"Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30

days after its entry or until the time for appeal from the judgment as extended by Rule 73(a) has expired. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action or, in an action for divorce, an order relating to the care, custody and support of minor children or to the separate support or personal liberty of the wife shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (d) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal."

STÀTEMENT OF THE CASE

In this case the parties, formerly husband and wife, have shared the legal and physical custody of their two minor children equally since their divorce. At the time of the divorce the former husband, petitioner here, had been employed for ten years as Chief Counsel for a state employee association as labor negotiator and labor lawyer. The former wife, a certified teacher, was employed only part-time as a tutor in the public schools. Petitioner's salary was $40,000.00 per year and his former wife's salary was $4,000.00 per year. In the divorce decree, petitioner was ordered to pay his former wife $70.00 per week in alimony and $70.00 per week per child in child support. Petitioner was also ordered to maintain health insurance for the minor children, to pay reasonable medical and dental expenses, and to maintain life in-

surance for the benefit of his former wife and his children.

On September 8, 1984, the petitioner was involuntarily discharged from his employment without notice and without severance pay. Petitioner shortly thereafter filed a Motion to Amend Divorce Judgment and a further Motion to Amend the prior Motion, seeking modification of the alimony and support payments. At the hearing, the evidence showed that the petitioner's income had been substantially reduced and his former wife's income had substantially increased. Petitioner's assets and net worth were substantially less than his former wife's assets and net worth. Petitioner had earned $2,000.00 gross less business expenses in the three-month period since his loss of job and his assets were too limited to produce any significant income. His former wife's income had increased to approximately

$500.00 per week gross as a permanent substitute teacher. Her assets produced income also. In an Order dated December 5, 1984, the court denied modification of the alimony and child support, finding no substantial change in petitioner's circumstances and made no findings with respect to his former wife's circumstances. The court denied petitioner's request for findings of fact and conclusions of law and petitioner appealed the case to the Maine Supreme Judicial Court.

The petitioner filed a second Motion to Amend the Divorce Judgment. The court used the judgment on the petitioner's first Motion to Amend as the benchmark for change of circumstances. The petitioner had income of $5,774.95 less business expenses since that time and his net worth had been substantially reduced. His former wife had earned $15,000.00 for the preceeding school year, had income from

investments of better than $418.00 a month and had a net worth of approximately $85,000.00, partly due to an inheritance. In an Order dated August 16, 1985, the court found that the petitioner had made good faith, reasonable efforts to obtain employment and that his future employment was uncertain but improving. Then the court found that there had "not been a showing of substantial change of circumstances but there has been a sufficient change of circumstances to justify temporary relief." The court ordered the alimony temporarily reduced to $50.00 per week and the child support to $50.00 per week per child, both to revert back to the original amounts at the end of fifty-two weeks. Once again, the court considered only the petitioner's circumstances and made no findings with respect to his former wife's circumstances. The court again denied the petitioner's Motion for

Findings of Fact and Conclusions of Law on the ground that they were set out in detail in the court's order. The petitioner again appealed to the Maine Supreme Judicial Court.

Subsequently the Supreme Court vacated the first order, on the ground of error in denial of the petitioner's request for findings of fact and conclusions of law. The Court also stayed the appeal of the second order and remanded the entire matter for rehearing.

At the time of the rehearing on January 2, 1986, the petitioner had had income, net of business expenses, of $7,574.95 for the calendar year 1985. That included approximately $900.00 in unemployment compensation. His net worth had again substantially decreased, now standing at $8,536.00, exclusive of $14,000.00 in a vested pension plan of his former employer. The petitioner had

monthly living expenses of $1,295.34, of which $426.73 of that pertained to the needs of the children for the one-half time the children resided with the petitioner.

Plaintiff was now employed full-time professionally as a school teacher with an annual salary of $19,000.00. She had income from investments of better than $400.00 a month. She also had group life, dental and health insurance benefits available for her and the children and state retirement system benefits and paid sick leave, personal leave and vacation. She had monthly living expenses of $1,386.63 for herself and the children for the one-half time the children resided with her. In a Decision and Order dated January 24, 1986, the court this time found that the financial circumstances of both parties had changed substantially, that the petitioner's income and net worth had

substantially decreased since the divorce decree, negatively affecting his ability to pay alimony and child support, and that his former wife's income and net worth had substantially increased since the divorce decree, reducing her need and the financial necessity for alimony. Then the court determined that "the present needs and resources of the parties" required the petitioner to pay his former wife $50.00 per week in alimony and $50.00 per week per child in child support retroactively to the filing of petitioner's second Motion to Amend the Divorce Judgment. In this decision the court made express findings of fact and conclusions of law. But it failed to make any findings of fact pertaining to the petitioner's net worth, the relative ability of the parties to pay alimony and child support, the needs of the children for the half-time they reside with the petitioner, or the needs of the

children for the half-time they reside with the former wife. The court provided no basis as to how it determined the amounts of alimony and child support ordered. The court did again find that the petitioner had made reasonable efforts to obtain employment. The court denied the petitioner's Motion to Amend Findings of Fact and to Make Additional Findings of Fact. The petitioner appealed to the Maine Supreme Judicial Court.

The Supreme Judicial Court denied the petitioner's appeal on the basis of the broad discretion of the trial court, noting that "unusual deference" is accorded to the findings of the trial court. Finding the judgment below not to be manifestly unjust, the Supreme Judicial Court affirmed. In doing so, the Court stated that it need not address the petitioner's contention that the judgment resulted from gender discrimination.

RAISING OF THE FEDERAL QUESTIONS

1. The issue of sexual discrimination in violation of the Equal Protection Clause in ordering the petitioner to pay alimony and child support was raised before the trial court at the January 2, 1986, hearing in the petitioner's Trial Brief and closing argument as follows:

> "Discrimination against men in the imposition of alimony obligations has been determined to be violative of the equal protection clauses of the United States...Constitution." Trial Brief of Defendant, at 5.

> "Thus, the equal protection of the laws under the Fourteenth Amendment to the United States Constitution...requires the gender-neutral apportionment of the child support obligation." Trial Brief of Defendant, at 5.

> "Mr. Howard: I believe essentially that is where the problem exists in this case, because if we were to take the actual facts as they exist, as they existed at each one of the hearings, and as they exist today, if a decision is based on the evidence that is before you, before the Court, that it is a dollars and cents determination, and I would submit if the roles were reversed, if Mrs. Finn were the one with the income level change

that we are talking about, instead of Mr. Finn, I would submit that the decisions would have been different by this Court. I believe there is a bias that has prevailed in these prior hearings, that indicate a --

"The Court: Do you mean a gender bias?

"Mr. Howard: A gender bias, Your Honor...."

Transcript of Hearing, Superior Court for Kennebec County, January 2, 1986, at 82-83.

The trial court did not expressly address the issue in its Decision and Order of January 24, 1986.

2. The issue of sexual discrimination in violation of the Equal Protection Clause in ordering the petitioner to pay alimony and child support was raised on appeal before the Maine Supreme Judicial Court in the petitioner's Statement of Issues and Brief of Appellant in that Court as follows:

"Did the Court err in applying a preference for the Plaintiff over the Defendant in determining alimony and parental rights and responsibilities

because of her sex, thereby...denying the Defendant the equal protection of the laws...in violation of the Fourteenth Amendment to the United States Constitution...?

. . .

"B. Did the Court's gender bias in this case deny the Defendant the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?"

Brief of Appellant, Statement of Issues, at 11.

"The Court applied a preference for the Plaintiff over the Defendant in determining alimony and parental rights and responsibilities because of her sex and thereby...denied the Defendant the equal protection of the laws...in violation of the Fourteenth Amendment to the United States Constitution....

. . .

"B. The Court's gender bias in this case denied the Defendant the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution...."

Brief of Appellant, at 27, 29.

The Supreme Judicial Court passed upon this issue by stating that it need not

address it. Finn v. Finn, 517 A.2d 317, 319 (Me.1986).

3. The issue of sexual discrimination in violation of the Equal Protection Clause by denying petitioner a stay of the court order pertaining to alimony and child support pursuant to Court Rule 62(a) and thereafter incarcerating him for contempt of court was raised before the trial court in argument at the hearing on the petitioner's motion to stay the order and at the hearing on petitioner's former wife's motion for incarceration as follows:

> "Mr. Finn: ...With respect to the motion for stay pending appeal, submit, Your Honor, that in this particular case the reason for the exception from automatic stay in Rule 62(a) doesn't apply, that as the rule specifically is stated and Field, McKusick, and Wroth set out that amendment was made in 1960 to make certain that the wife and children are cared for pending an appeal in a divorce action. In this particular case, the plaintiff and the children are not in immediate need. Their needs have all been taken care of and

do not have need of the particular funds that we're talking about. I suggest, Your Honor, that in view of the purpose of the rule, which you will note applies specifically to the wife and children and therefore illustrates a gender preference, that the rule is defective...."

Transcript, Hearing on February 10, 1986, at 2-3

"Mr. Howard: Your Honor, with a final note, the basis for denying to Mr. Finn any stay in this action is on the basis of Rule 62 A, and Rule 62 A provides that there will be an automatic stay in the event of an appeal unless otherwise ordered by the Court an interlocutory or final judgment in an action for an injunction or receivership action or action for divorce or an order related to the care, custody, and support of minor children, or to the separate support or personal liberty of the wife.

"There is a specific reference and a specific exclusion to the automatic stay making reference to the liberty and the separate support of the wife. There is no such provision in that rule with respect to the husband.

Mr. Finn, on the basis of sex--on the basis of him not being the wife, is being denied the opportunity of an automatic stay so far as it relates to the alimony provisions in the divorce judgment. The rule is blatantly sex biased on its face, and it is our position that--that the Court lacks

> the constitutional authority to deny the automatic stay in this particular case."
>
> Transcript, Hearing on April 3, 1986, at 10-11.

The trial court did not expressly pass upon this issue.

4. The issue of sexual discrimination in violation of the Equal Protection Clause by denying petitioner a stay of the court order pertaining to alimony and child support pursuant to Court Rule 62(a) and thereafter incarcerating him for contempt of court was raised before an appeal to the Maine Supreme Judicial Court in the petitioner's Statement of Issues and Brief of Appellant as follows:

> "Did the Order of February 10, 1986, denying the Defendant's Motion for Stay Pending Appeal and the Order for Motion on Incarceration dated April 3, 1986, deny the Defendant the equal protection of the laws...in violation of the Fourteenth Amendment to the United States Constitution...?"
>
> Statement of Issues, Brief of Appellant, at 11B.

> "The Order of February 10, 1986, denying Defendant's Motion for Stay Pending Appeal and the Order for Motion on Incarceration dated April 3, 1986, deny the Defendant the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution...."
>
> Brief of Appellant, at 36.

The Supreme Judicial Court passed upon this issue by finding that petitioner had failed to present a justiciable issue because he had complied with the order below subsequent to the denial of stay and incarceration. Finn v. Finn, 517 A.2d 317, 318 (Me.1986).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question concerning discrimination by a state court against one of the parties in a domestic relations case on the basis of sex shielded from review by the exceptionally broad discretion exercised by the court in such cases, the result being the arbitrary determination of the obligor and of the level of alimony and child support. The Maine Supreme Judicial Court has established a standard of exceptionally broad discretion in the trial court in domestic relations cases, as that Court stated in this case:

> "Our review of the Superior Court's determination is quite limited.
>
> > 'The plurality of considerations involved in evaluating a motion for modification requires that the Law Court accord unusual deference to the findings of the trial court.
> >
> > '...Absent a violation of some positive rule of law, this

> Court will overturn the trial court's decision of such a question only if it results in a plain and unmistakable injustice, so apparent that it is instantly visible without argument."
>
> Williams v. Williams, 444 A.2d 977, 980 (Me. 1982) (quoting Smith v. Smith, 419 A.2d 1035, 1038 (Me. 1980))." Finn v. Finn, 517 A.2d 317, 318 (Me.1986).

The Court then stated with respect to the present case:

> "Given these findings the judgment for child support and alimony was not manifestly unjust. We need not address the defendant's contention that the judgment resulted from gender discrimination by the Superior Court." Id.

The standard set by the Maine Supreme Judicial Court is not constitutionally sufficient for the purpose of review of the issue of violation of the Equal Protection Clause of the United States Consitution by the trial court. As this Court has previously recognized, too wide a discretion in the court can render review on appeal inoperable, thereby

shielding judicial bias and discrimination. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684-85 (1968). By applying an inappropriate standard of review, the Maine Supreme Judicial Court here erred in failing to address the issue of, and find, gender discrimination in violation of the Equal Protection Clause of the Constitution of the United States.

Discrimination against men in the imposition of alimony obligations has already been determined by this Court to be violative of the Equal Protection Clause. Orr v. Orr, 440 U.S. 268 (1979). In Orr the Court reiterated that discrimination on the basis of gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. Id. at 279. In the State of Maine it is clear that there is no governmental objective served by discrimination against men in alimony or

child support since it has been established legislatively that the wife and husband have equal responsiblity in those matters. 19 M.R.S.A. Sec. 721; 19 M.R.S.A. Sec. 752(7).

There is a gender bias prevalent throughout this case. In neither the December 5, 1984 decision on the Petitioner's first motion to amend nor the August 16, 1985, decision on the second motion to amend did the Court consider the wife's employment, income, earning capacity and assets even relevant. In each of those decisions the Court limited its considerations to the petitioner's employment, income, earning capacity and assets. (In both instances the petitioner requested Findings of Fact and Conclusions of Law and the requests were denied by the Court.) In neither instance did the Court give consideration to the petitioner's personal needs or the actual needs of the

children associated with his physical custody of the children 50 percent of the time.

The gender bias is further evident in the January 24, 1986 decision where the Court on its own did make findings of fact and conclusions of law because of the Supreme Judicial Court's prior vacation of the December 5, 1984 order because of lack of sufficient findings. Here the findings of fact clearly show the resources of the wife to be substantially greater than those of the husband and the needs of the husband substantially greater than those of the wife. Yet without any discernible reasons, the Court ordered the husband to pay an apparently arbitrary $150.00 per week to the wife in alimony and child support, leaving petitioner little or nothing to provide for himself and his children the half-time they reside with him. In fact, the Court refused findings

acknowledging such residence of the children with the petitioner even though it knew it was factual. The Court's determination was arbitrary and discriminatory.

The gender bias of the Court is further evidenced by the predisposition of the Court that the petitioner would be required to pay the wife. At the close of the hearing on January 2, 1986, the Court acknowledged that no determination had been made at that point, yet at the same time it stated:

> "no matter under whose theory, whether the Plaintiff's theory or the Defendant's theory is accepted by the Court, there is certainly going to be an amount of arrearage due to the Plaintiff."

Also telling is the following exchange from the record where the Court devalues the care provided by the petitioner for his children and shuts off even consideration of any monetary contribution by the

wife:

> "The Court: What are you suggesting that your client (the petitioner) contribute toward the payment of his children in terms of dollars and cents on a weekly basis?
>
> "Mr. Howard: I am submitting that his caring for the children for fifty percent of the year should be his contribution.
>
> "The Court: In other words, zero.
>
> "Mr. Howard: Zero. And her contribution --"

In a similar vein the following exchange occurred at the hearing on the petitioner's Motion for Additional Findings of Fact:

> "Mr. Finn: ... The record establishes, I believe, that the needs of the children in the case have been fully met at all times, I believe is relevant.
>
> "The Court: By Mrs. Finn?"

The attitude of the court reflected in these comments is the stereotypical attitude rejected by this Court previously:

> "Stanton v. Stanton, 421 U.S. 7, 10 (1975), held that the 'old notio(n)' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas,' Id., at 14-15." Orr v. Orr, supra, at 279-280.

The Supreme Judicial Court, despite the disparity in treatment of the parties, sustained the trial court's determination on the ground that the court considered the petitioner's "earning capacity, future prospects and ability to pay." Finn v. Finn, supra, at 318. Despite the requirement that the trial court make findings concerning those facts that are dispositive with respect to its ultimate decision, Cyr v. Cyr, 432 A.2d 793 (1981), the trial court made no express finding of earning capacity or future prospects. The trial court did not say that was the basis for its determination. The Supreme

Judicial Court inferred it from the trial court's findings that the petitioner's former employment had paid $40,000.00 annual salary and that the petitioner had "made reasonable efforts to obtain employment and has made some progress, although more effort could be made to gain full-time employment." Id. at 318-19. Those findings are simply too ambiguous to infer an earning capacity and future prospects sufficient to justify under Equal Protection standards the evident disparity of treatment between the petitioner and his former wife. Cf. Interstate Circuit, Inc. v. Dallas, supra. The arbitrariness of the trial court's determination is made evident by its failure even to apply the required standards of consideration of the needs of the children and the relative financial ability and needs of the husband and wife, Williams v. Williams, 44 A.2d 977

(Me.1982), Smith v. Smith, 419 A.2d 1035 (Me.1980), Gardner v. Perry, 405 A.2d 721 (Me.1979), Pendexter v. Pendexter, 363 A.2d 743 (Me.1976), and the apportionment of the child support oblitation between the parents, Gardner v. Perry, supra. These requirements cannot be overcome by an ambiguous finding that the petitioner could have made more effort to gain full-time employment although he had made reasonable efforts to do so. The trial court's alimony and child support award is arbitrary. The findings and conclusions of the court do not provide a sufficient foundation for the award.

In summary, there is a disparity of treatment in the present case between the petitioner husband and his former wife. This disparity of treatment is in conflict with the requirements of the Equal Protection Clause of the Constitution of the United States. There are no proper go-

vernment objectives served by the disparity in treatment. The Maine Supreme Judicial Court, applying a constitutionally inadequate standard of review, erred in failing to find the trial court violated the Equal Protection Clause in ordering the petitioner to pay his former wife $50.00 per week in alimony and $50.00 per week per child in child support.

2. This case also presents an important question concerning the explicitly different treatment of husbands and wives in the Maine Rules of Civil Procedure, Rule 62(a), pertaining to the effect of an appeal with respect to a stay of an order relating to child support and alimony. The Rule provides that court judgments are automatically stayed upon the filing of an appeal to the Supreme Judicial Court and during the pendency of the appeal except, inter alia, in an action for a divorce, an order relating to the support of minor

children or to the separate support of the wife. That exception was established to ensure that the wife and children in her custody are cared for pending an appeal. 2 Field, McKusick and Wroth, Maine Civil Practice 85 (1970). By the express terms of the rule, a husband in need of support for himself and children in his custody would not have the same benefit of the exception to an automatic stay; the support orders for his benefit and the benefit of his custodial children would be automatically stayed pending appeal by the wife. Furthermore, there would appear to be no discretion in the court to relieve the husband from the automatic stay. The Rule by its terms provides discretion only to waive the exception to the automatic stay, not to waive the general automatic stay of Rule itself.

The defect in Rule 62(a) is no different than that found by this Court

in alimony statutes like that of Alabama in Orr v. Orr, 440 U.S. 268 (1979). Here, like in Orr, the regulatory scheme " 'pro-vides that different treatment be accorded ...on the basis of sex; it thus esta-blishes a classification subject to scrutiny under the Equal Protection Clause, Reed v. Reed, 404 U.S. 71, 75 (1971).' " Id. at 278-79. Under the Equal Protection Clause of the United States Constitution, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Id. at 279.

In Orr the Court examined three governmental objectives which might arguably have been served by the Alabama statutory scheme at issue there. That same analysis is appropriate here. The Rules at issue here, like the Alabama alimony statutes, effectively announce the Maine courts'

"preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens." Id. This Court rejected such purpose, stating

> "Stanton v. Stanton, 421 U.S. 7, 10 (1975), held that 'old notio n ' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas,' id., at 14-15." Id. at 279-80.

In Maine, it is even more decisively established that there is no governmental objective served by the discrimination against men in alimony and child support since it has been established legislatively that both husband and wife have equal responsibility for alimony and child support. 19 M.R.S.A. Sec. 721; 19 M.R.S.A. Sec. 752(7). Thus the Maine

court rules are in actual conflict with established governmental objectives.

The Maine Rule in question here, as the statute in Orr, seeks "to provide help for needy spouses, using sex as a proxy for need." Orr v. Orr, supra, at 280. But as in Orr, there is no need to use sex as a proxy for need. In Maine court proceedings, hearings concerning the parties' relative financial circumstances already occur. Needy males can be helped along with needy females with little, if any, additional burden on the State. Again as in Orr, the same rationale applies to any purpose to compensate women for past discrimination during marriage. Also here as in Orr, it is evident that the one who benefits from the gender-biased rule is not the woman who is needy and deserving of the protection of the rule and who can be protected through the hearing process. But it is the financial-

ly secure woman who gains an advantage over the husband in need which she would not have with a gender-neutral rule. As this Court stated:

> "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special objection. Cf. United Jewish Organizations v. Carey, 430 U.S. 144, 173-74 (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to rebound - if only indirectly - to the benefit of those without need for special solicitude." Id. at 283.

In the present case the petitioner husband requested the court to exercise its discretion to order a stay of the order requiring him to pay the wife alimony and child support. The facts

showed that the wife was not "needy", and, at least relatively the petitioner was. Nevertheless, the court denied the petitioner's request. Petitioner was subsequently found in contempt of court for failing to pay the ordered amounts and was incarcerated until he paid some $5,000.00 in arrearages. Petitioner submits that the Rule on the basis of which petitioner incurred these consequences is unconstitutional.

The argument might be made here that the petitioner lacks standing to assert the unconstitutionality of Rule 62(a). The hearing held on the relative financial status of the husband and wife for the purpose of determining alimony and child support obligations resulted in a determination that petitioner husband should pay the wife alimony and child support. Thus it would appear that the wife had been determined "needy" and therefore, even

under a gender-neutral rule, petitioner husband would not get the benefit of a stay. But that argument does not hold up. As is evident in the present case, the award of alimony and child support may not establish the present "neediness" of the parties for purposes of a stay pending appeal. Here the actual present financial status of the wife was substantially better than the husband's. According to the Supreme Judicial Court on review, the award of alimony and child support to the wife despite the present relative financial circumstances was based upon the husband's earning capacity and future prospects, not on the economic circumstances at the time of the hearing. Finn v. Finn, 417 A.2d 317, 318 (1986). Thus it was not directly related to the "neediness" of the parties during the appeal period, which is the period the Rule 62(a) exception was intended to

provide for. In fact, the discriminatory nature of the exception is evident in the demonstrable neediness, certainly relatively speaking, of the petitioner husband in the present case. Yet the rule operated to the benefit of the financially secure wife.

If the Rule in question here is ruled unconstitutional, the court rules might be amended to extend the benefit of the exception to an automatic stay of judgment to husbands as well as wives or deny such an exception to both parties. If the latter course is chosen, the petitioner is likely to benefit, particularly since he has a new motion for modification of alimony and child support before the court. To highlight the issue here by transposing it to the sphere of race, as this Court did in Orr, there is no doubt that a Court rule providing whites, but not blacks, with enforcement of judgments

pending appeal could be challenged by a black who was required to pay the judgment pending appeal.

In summary, Rule 62(a) of the Maine Rules of Civil Procedure explicitly discriminates on the basis of sex. It favors wives and disfavors husbands. The clear intent was to provide for needy women and the children in their custody. It fails to provide for needy men and the children in their care. The rule operated here to the detriment of the petitioner who had greater need than his former wife and to the benefit of the financially secure former wife. Under Orr v. Orr, supra, this Court should find Rule 62(a) unconstitutional as violative of the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorary should be granted.

Respectfully submitted,

John J. Finn, Pro se
20 Fairbanks Street
Augusta, Maine 04330
(207) 623-1472

Dated: February 2, 1987

APPENDIX A

SHEILA H. FINN

v.

JOHN J. FINN

Supreme Judicial Court of Maine

Argued Sept. 10, 1986
Decided Nov. 3, 1986

Before McKUSICK, C.J., and
NICHOLS, ROBERTS, GLASSMAN
and CLIFFORD, JJ.

GLASSMAN, Justice

John J. Finn, the defendant in the divorce action, appeals from a judgment of the Superior Court, Kennebec County, entered on its order granting the defendant's motion to amend divorce judgment and granting the plaintiff's motion to hold the defendant in contempt for nonpayment of child support and alimony as required by the judgment of divorce. He contends that the court abused its discretion in its order for his payment of child support and alimony and

by finding him in contempt for noncompliance with the original divorce judgment; that the denial of a stay of execution of the order pending appeal deprived him of the equal protection of the laws; and that the justice who entered the original judgment of divorce lacked authority to do so. We find no merit in these contentions and affirm the judgment.

Finn did not appeal the judgment of divorce in this case entered by the Superior Court on April 24, 1984, requiring the defendant to pay to the plaintiff $70 a week in child support for each of their two children and $70 a week alimony. He later sought to reduce the alimny and child support payments by filing two motions to modify the divorce judgment, the first on October 10, 1984 and the second on December 28, 1984. On appeal from the judgment denying the first motion, this court vacated the order and

remanded it to the Superior Court with instructions to consider what modification was justified by changes of circumstance from the date of the divorce. Finn v. Finn, 499 A.2d 1234 (Me.1985). On remand the Superior Court reduced the defendant's child support obligations to $50 a week for each child and reduced the alimony to $50 a week, retroactive to the filing date of the second motion to amend. Acting on plaintiff's motion, the court also found the defendant in contempt for nonpayment of a stipulated amount of arrearages in alimony and child support. We denied the defendant's motion for a stay of the judgment pending appeal. The defendant later purged himself of contempt by full payment of the amount of the arrearages.

I

The defendant asserts that the record and findings do not support the judgment

modifying the amount of alimony and child support he is to pay to the plaintiff. Emphasizing the static economic circumstances of the parties at the time of the hearing on remand, the defendant contends that he should pay nothing. Our review of the Superior Court's determination is quite limited.

> "The plurality of considerations involved in evaluating a motion for modification requires that the Law Court accord unusual deference to the findings of the trial court.
>
> > "...Absent a violation of some positive rule of law, this Court will overturn the trial court's decision of such a question only if it results in a plain and unmistakable injustice, so apparent that it is instantly visible without argument."

Williams v. Williams, 444 A.2d 977, 980 (Me.1982) (quoting Smith v. Smith, 419 A.2d 1035, 1038 (Me.1980)).

(1) The findings support the judgment. The Superior Court was not limited to consideration of economic circumstances of the parties on the day of

the hearing. The court properly considered the defendant's earning capacity, future prospects and ability to pay. Bryant v. Bryant, 411 A.2d 391, 395 (Me.1980); Pendexter v. Pendexter, 363 A.2d 743, 750 (Me.1976); Schuler v. Schuler, 382 Mass. 366, 416 N.E.2d 197, 203 (1981); 19 M.R.S.A. Sec. 721 (1981). The court noted the defendant's previous annual salary of $40,000 and found that the defendant could increase his efforts to find full-time employment. Given these findings the judgment for child support and alimony was not manifestly unjust. We need not address the defendant's contention that the judgment resulted from gender discrimination by the Superior Court.

(2) The defendant also maintains that the reduction of payments should have been made retroactive to the date of the filing of his first motion to amend, rather than

the second. Whether a modification decree should be made retroactive to the date of filing of the application for modification is a matter left to the sound discretion of the divorce court. Wood v. Wood, 407 A.2d 282, 288 (Me.1979). The court found that when the defendant filed his first motion on October 10, 1984, the change in the parties' finances was not sufficiently substantial to warrant a reduction in payments, but by the time of the filing of his second motion, on December 28, 1984, substantial change warranted a reduction retroactive to that date.

The partial retroactivity was within the trial court's discretion. At the time of the filing of the first motion the defendant had been unemployed for only one month. It was the trial court's task to decide when the relative financial conditions of the parties were substantially changed. See Smith v. Smith, 419 A.2d

1035, 1037 (Me.1980). On this record the effective date for the retroactive modification of the divorce judgment did not result in "a plain and unmistakable injustice" to the defendant. Id. at 1038.

II

(3) The defendant also seeks to appeal from the Superior Court's finding and civil contempt commitment for nonpayment of the stipulated amount owed in arrearages for alimony and child support. The defendant does not challenge the stipulated amount owed, but claims he was unable to pay that amount. We have previously stated that "(j)usticiability requires that there be a real and substantial controversy, admitting of specific relief through a judgment...." Connors v. International Harvester Credit Corp., 447 A.2d 822, 824 (Me.1982). By payment of the amount of the arrearages, the defendant totally purged his contempt.

The now purged adjudication of contempt carries no possibility of collateral consequences to the defendant. Matter of Establish Inspection of the Metal Bank of America, Inc., 700 F.2d 910, 913 (3d Cir.1983).[1] Because on the facts of this case no actual, affirmative relief can be granted, the defendant has not presented a justiciable issue for our determination.

III

(4) The defendant maintains that because Maine Rule of Civil Procedure 62(a) discriminates against men, he was unconstitutionally denied a stay of the Superior Court's order pending appeal. The denial of the defendant's motion for stay filed prior to a notice of appeal was by order of the Superior Court, not by automatic operation of Rule 62(a), which governs the effect of a judgment providing for child support or alimony "unless otherwise ordered by the court...." Fol-

lowing the filing of his notice of appeal, the defendant filed a motion for stay of execution before this court which was denied. See M.R.Civ.P. 75B (a) and (c) and 62(g). Given the defendant's compliance with the Superior Court order, this question also fails to present a justificable issue for our determination.

IV

(5) Finally, the defendant challenges the authority of the associate justice of the Supreme Judicial Court who presided over the divorce trial. Defendant concedes that the Chief Justice of the Supreme Court assigned the presiding justice to the Superior Court. The assignment was an exercise of the Chief Justice's power under 4 M.R.S.A. Sec. 101 (Supp.1985). The assignee justice, sitting as a Superior Court justice, had authority to preside at the trial of the action for divorce. See 19 M.R.S.A. Sec.

664 (1981).

The entry is:

Judgment affirmed.

All concurring.

1. Several federal cases have held challenges to previously purged contempt citations moot. See, e.g., McDonald's Corp. v. Victory Inv., 727 F.2d 82, 85-86 (3d Cir.1984); Spangler v. Pasadena City Bd. of Educ., 537 F.2d 1031, 1032(9th Cir.1976); United States v. Watson Chapel School Dist. No. 24, 446 F.2d 933, 939 (8th Cir. 1971), cert. denied, 404 U.S. 1059, 92 S.Ct. 739, 30 L.Ed.2d 747 (1972). But see Wilson v. Superior Court, 31 Cal.2d 458, 189 P.2d 266 (1948) (payment under legal compulsion does not preclude review on certiorari to determine if trial court exceeded its jurisdiction in making contempt order for nonpayment of alimony alleged due).

SHEILA H. FINN

v.

JOHN J. FINN

Supreme Judicial Court of Maine.

Argued Sept. 3, 1985.
Decided Nov. 8, 1985.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, and GLASSMAN, JJ.

MEMORANDUM OF DECISION

On December 5, 1984, the Superior Court (Kennebec County) denied the motion of former husband John J. Finn for modification of the alimony and child support provisions of the divorce judgment dated April 24, 1984, and held him in contempt for the failure to pay arrearages of $2,520. Thereafter, Mr. Finn requested findings of fact and conclusions of law under M.R.Civ.P. 52, but the Superior Court denied that request. On Mr. Finn's appeal, we find that denial to be error.

The factual findings contained in the court's order are inadequate to serve either as the basis for appropriately "facilitating appellate review" or "as the benchmark from which later change in circumstances may be measured." Cyr. v. Cyr, 432 A.2d 793, 396-97 (Me.1981).

While this appeal has been pending, Mr. Finn has brought another motion for modification, which the Superior Court on August 16, 1985, granted in part, while finding him in contempt for failure to pay $7,105 since December 1984. Since the present proceedings initiated by Mr. Finn's first motion for modification must go back to the Superior Court, we remand with directions that the same justice who heard the second motion shall hear anew the whole matter of modification of the divorce judgment and shall determine on an updated record what modification, if any, is justified by change of circumstances

from April 24, 1984, to the date of this final order. The hearing justice should take into account the temporary reduction in alimony and support payments that he previously found to be justified because of change of circumstances between December 5, 1984, and August 16, 1985.

The entry is:

> Judgment vacated; remanded to the Superior Court for further proceedings consistent with the opinion herein.

All concurring.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION,
DOCKET NO. CV-82-317

SHEILA H. FINN,
Plaintiff

v.

ORDER

JOHN J. FINN,
Defendant

This matter came on for hearing on December 4, 1984 on defendant's amended motion to amend the divorce decree entered April 24, 1984, and on plaintiff's motion for contempt for non-payment of child support and alimony. Notice of the hearing was given and both parties were present throughout the consolidated hearing and were represented by counsel. The court took judicial notice of the file in this matter, and considered the evidence presented by the parties and the argument of counsel.

With respect to defendant's motion to amend the divorce decree, the court finds that on September 9, 1984 the defendant's

employment as general counsel to Maine State Employee's Association was terminated. Since his termination, defendant has received income in the approximate amount of $11,000. Defendant is currently engaged in an effort to secure full time employment but has not as yet been successful. Defendant terminated all payments under the divorce decree on the date of his discharge without approval of the court. At the time of the original hearing on the divorce, defendant testified that his future employment was uncertain. In entering the original decree, it was within the court's contemplation that defendant's employment might be temporarily interrupted. Defendant's earning capacity remains unchanged and he has sufficient assets to permit him to meet his obligations under the decree of this court. Defendant has not demonstrated a substantial change in cir-

cumstances entitling him to the relief requested.

ACCORDINGLY, IT IS ORDERED THAT: DEFENDANT'S MOTION TO AMEND THE DIVORCE DECREE BE, AND HEREBY IS, DENIED. EACH PARTY SHALL BEAR THE COSTS OF THEIR OWN COUNSEL FEES WITH RESPECT TO THIS MOTION.

With respect to plaintiff's motion for contempt, the court finds:

1. As a result of a judgment of this court, the defendant has been ordered to pay to the plaintiff child support and alimony totalling $210.00 per week.

2. The defendant failed to make the required payments for the period of September 8, 1984 to December 4, 1984.

3. At the time that the payments which have not been made were due, the defendant had the ability to make those payments.

4. The defendant is in arrears in payments required by this court in the amount of $2,520.00 as of this date.

5. The defendant has failed to comply with the terms of this court's prior order regarding child support and alimony.

6. Defendant has the ability to make those payments as of the date of hearing.

Therefore, the court finds that the defendant is in contempt of this court.

The court ORDERS:

Judgment for plaintiff on the unpaid arrearage in the amount of $2,520.00.

Defendant shall be committed to the County Jail until he shall purge himself of the contempt by payment in full of that sum.

Defendant shall pay to Sumner Lipman, Esq., Attorney for plaintiff, $150.00 as the plaintiff's counsel fees for bringing this action.

Dated: December 5, 1984.

/s/ Daniel E. Wathan
Justice, Supreme Judicial
Court sitting in the
Superior Court

STATE OF MAINE
Kennebec, ss.

SUPERIOR COURT
Civil Action
Docket No. CV-82-317

SHEILA FINN,
Plaintiff

v.

JOHN J. FINN,
Defendant

ORDER

This matter came before the Court for hearing on July 31, 1985 on the Motion for Contempt filed by the Plaintiff and the Motion to Amend filed by the Defendant. Notice of hearing was given according to law and both parties were present throughout the hearing and represented by counsel. Having heard the testimony and the arguments of counsel, the Court does make the following findings and Orders:

1. The Court does indicate that it has reviewed prior orders of the Court and relevant portion of the transcript of the hearing of December 4, 1984.

2. Upon consideration of the Defendant's Motion to Amend, the Court finds

that the Defendant has made good faith, reasonable efforts since December, 1984 to obtain employment and has made some progress. Since January, 1985 the Defendant has had income from teaching at C.M.V.T.I. in the amount of $90.00 per week for fifteen weeks and also two weeks unemployment compensation at the rate of $149.00 per week. The Defendant has provided professional services to the Fire Fighters Union and has received monies and expects to receive an additional amount. The Court finds that the Defendant has actively engaged in an effort to gain full time employment although more efforts could be made. The Defendant has debts in addition to his mortgage in the amount of approximately $2,500.00 and is current on his obligations with the significant part of the outstanding debt being in legal fees. Since the last hearing in December, 1984, the Defendant's future employment is

uncertain but is improving. His earning capacity since the prior hearing remains unchanged. He has sufficient assets to meet his obligations, both personal and under the decree. There has not been a showing of substantial change of circumstances since December, 1984 hearing but there has been a sufficient change of circumstances to justify temporary relief.

3. The Court orders that the Divorce Decree be amended by adding an additional paragraph to Section 4 of the Divorce Decree after the two existing paragraphs of Section 4. Said new paragraph is as follows:

> "Commencing August 3, 1985 for a period of 52 weeks, child support shall be in the amount of $50.00 per week per child for each of the minor children and the alimony $50.00 per week. At the end of 52 weeks, the child support and alimony shall revert back to original amounts described above."

4. In all other respects the Defendant's Motion to Amend is denied and the

Divorce Decree shall remain in full force and effect.

5. Upon consideration of the Plaintiff's Motion for Contempt, the Court finds that the Defendant was ordered to make a total payment of $210.00 per week and that he has failed to make any payment since December, 1984, such that there is an arrearage due through July 27, 1985 in the amount of $7,105.00. The Court finds that at the time of payment and at this time the Defendant had the capacity to make at least a portion if not all the payments. This finding is based on the Defendant's income from January 1, 1985 to date including the $90.00 per week for 15 weeks from C.M.V.T.I., two weeks unemployment payments of $149.00 per week, other income, assets that were liquid or assets that could have been liquidated, and an amount of at least $2,200.00 from tax return refunds. The Court finds the

Defendant in contempt for having failed to make said payments.

6. Upon the Plaintiff's Motion for Contempt the Court does order judgment for the Plaintiff in the amount of $7,105.00; said sum to be paid within 30 days by the Defendant and the Defendant is to be incarcerated in Kennebec County Jail if said sum is not paid within 30 days of the date of this Order until the Defendant has purged himself by paying said sum in full; the Defendant shall immediately file within 10 days of the date of this Order, the 1982 State Income Tax return and the 1983 Federal and State Income Tax returns; the Defendant's one-half interest in the refunds from said tax returns shall be paid over to the Plaintiff and the Defendant shall receive said sum as a credit towards payment of the past due arrearage and shall be considered toward satisfying the Contempt Order of this Court upon filing of said tax returns.

7. Upon the Motion to Amend and Motion for Contempt the Court orders that

each party be responsible for his or her own counsel fees.

DATED: 8/16/85

/s/ Morton A. Brody
Justice Morton Brody

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-82-317

SHEILA H. FINN,

Plaintiff

vs.

DECISION and ORDER

JOHN J. FINN,

Defendant

This matter is before the Court on the Defendant's Motion to Amend Divorce Judgment and the Plaintiff's Motion for Contempt. The parties appeared before the Court for hearings on July 31, 1985 and January 2, 1986.

In a divorce action heard by this Court on April 18, 1984, Defendant, John J. Finn, was ordered to pay the Plaintiff, Sheila Finn, child support in the amount of $70 per week. The Court's Order, dated April 24, 1984 specified that payments were to begin on April 27, 1984 and would cease upon emancipation of the youngest child or upon remarriage by Sheila Finn,

whichever occurred first.

On October 10, 1984, the Defendant filed a Motion to Amend Divorce Judgment seeking a reduction in the level of alimony and child support payments. At that time, Defendant was in arrears on his support obligations and the Plaintiff filed a Motion for Contempt. On December 5, 1984, the Defendant was found in contempt for failure to pay support in the amount ordered by the Court in the divorce judgment. Subsequently, the Defendant purged himself of contempt by paying the amount of arrearages.

On December 10, 1984, the Defendant filed a motion pursuant to M.R. Civ. P. 52 for findings of fact and conclusions of law with respect to the December 5 Order. Defendant's motion was denied. Subsequently, an appeal of the Order denying Defendant's Motion to Amend the Divorce Judgment was filed with the Law Court.

On December 28, 1985 the Defendant filed a second Motion to Amend Divorce Judgment. On March 18, 1985, the Plaintiff filed her second post-divorce Motion for Contempt for failure to comply with the terms of the divorce judgment. Both motions were heard by this Court on July 31, 1985. In an Order dated August 16, 1985, the Defendant was again found in contempt of the divorce judgment for failure to make support payments in the ordered amounts. The Court also found that the financial circumstances of the parties had changed substantially since the December 5, 1985 Order, necessitating a reduction in the level of support payments. Accordingly, the Court ordered a temporary reduction in alimony and child support payments. Effective August 3, 1985, for a period of 52 weeks, the level of child support was reduced to $50 per week per child and the level of alimony

reduced to $50 per week. At the end of the 52 week period, the payments would revert back to the original amounts provided in the divorce decree. In addition, the Court ordered the Defendant to pay $7,105 in arrearages within 30 days or be confined to the county jail until full payment was made. The Court also ordered the Defendant to immediately file the 1982 state income tax return and the 1983 federal and state tax returns with the Plaintiff to be paid her half share awarded under the divorce decree and, and the Defendant to pay his half share to the Plaintiff as a credit towards the past arrearages. Defendant filed a motion for stay of judgment pending disposition of his appeal to the Law Court of the December 5, 1984 Order denying his first Motion toAmend. Defendant's Motion for Stay was denied by the Superior Court.

On September 27, 1985, the Supreme

Judicial Court ordered a partial stay of the August 16, 1985 judgment ordering that pending final disposition of the Defendant's appeal from the December 5,1984 judgment, the Defendant would not be subject to incarceration for failure to pay the $7,105 in arrearages. In all other respects, the Defendant's Motion for Stay was denied.

On November 12, 1985, the Law Court vacated the December 5, 1984 judgment denying the Defendant a modification of the alimony and child support provisions of the divorce decree. In a memorandum decision, the Law Court remanded the matter to the Superior Court Justice who heard the Defendant's second Motion to Amend Divorce Judgment and ordered that same justice to hear the whole matter anew, taking into consideration any changes in circumstances from April 24, 1984 to the date of the final order. On

remand, the hearing justice is also ordered to take into consideration the temporary reduction in payments previously found to be justified by a change of circumstances between December 5, 1984 and August 16, 1985.

With these instructions, this matter is once again before the Court for a decision on the merits of Defendant's Motion to Amend Divorce Judgment and Plaintiff's Motion for Contempt. On January 2, the parties appeared before this Court for a hearing on the pending motions. At that time and under threat of immediate incarceration for contempt of the Court's August 16, 1985 Order, the Defendant turned over the income tax refund monies to the Plaintiff.

I. MOTION TO AMEND DIVORCE JUDGMENT

With respect to the Defendant's Motion to Amend the Divorce Judgment, the Court makes the following Findings of Fact

and Conclusions of Law:

1. The parties were divorced on April 24, 1984 and awarded joint custody of their minor children, Sean, then age 11, and Kevin, then age 7.

2. In the divorce decree, the Defendant was ordered to pay to the Plaintiff the sum of $70.00 per week per child as child support and $70.00 per week as alimony, the alimony being payable until the youngest child attains majority or until the Plaintiff remarries, whichever occurs first.

3. The Defendant was also ordered to maintain health insurance coverage for the children during their minority, to pay reasonable medical and dental expenses not covered by insurance, and to maintain a policy of life insurance in an amount equal to his gross salary for one year with the Plaintiff and the children as beneficiaries.

4. At the time of the divorce, the Defendant was employed as Chief Counsel for the Maine State Employees Association at a salary of $40,000.00 per year and the evidence showed his salary would increase to $47,000.00 in the near future. Through his employment at the Maine State Employees Association, the Defendant had available to him, group health insurance for himself and his dependents, group life insurance, and a retirement pension plan.

5. At the time of the divorce, the Defendant had a net worth of approximately $36,000.00, exclusive of retirement benefits.

6. On September 8, 1984, the Defendant was involuntarily discharged from his employment with the Maine State Employees Association without notice and without severance pay.

7. Shortly after his loss of employment, the Defendant obtained employment on

a contract basis as a consultant to the Bureau of Labor Education, University of Maine at Orono, for the gross amount of $2,000. Subsequently, through his consulting firm, the Defendant obtained contract employment with the Augusta Fire Fighters Union, Central Maine Vocational Technical Institute, the Bureau of Labor Education and Thomas College Graduate School. Defendant's income for 1985 was $7,474.95 including $900.00 in unemployment compensation.

8. During the year 1986, the Defendant will be teaching at Thomas College and at C.M.V.T.I., and has a potential minimum income from Thomas College of $1,830.00 and from C.M.V.T.I. of $600.00. Defendant also has potential income of an undetermined amount from a Worker's Compensation Commission case, the Augusta Fire Fighter's Union, and from a tax refund for the year ending December

31, 1984.

9. The Defendant has made reasonable efforts to obtain employment and has made some progress, although more effort could be made to gain full-time employment.

10. Defendant possesses assets valued at approximately $22,175.00 which includes $14,000.00 in a full vested pension plan. Defendant's corporation owns a condominium, valued at $36,000.00, which serves as the Defendant's residence and the base for his consulting business.

11. At the time of the divorce, the Plaintiff was employed part-time as a tutor in the Augusta public schools and earned aproximately $4,000 per year. The Plaintiff did not have group insurance, retirement benefits or vacation pay through her employment.

12. At the time of the divorce, the Plaintiff had a net worth of approximately $60,000.

13. The Plaintiff's employment situation has improved significantly since the divorce. During the 1984-1985 school year, the Plaintiff was employed as a permanent substitute teacher and received $500 per week. The Plaintiff is currently emloyed full-time since September, 1985 as a school teacher in the Augusta school system at an annual salary of $19,000.00 and through her employment she has group life dental and health insurance benefits which may be extended to cover the children. Through her employment, the Plaintiff also has Maine State Retirement System benefits, paid sick leave, personal leave, and vacation pay.

14. Largely as a result of an inheritance, the Plaintiff's net worth has increased to over $85,000 since the divorce. Her assets include a home located at 12 Trueworthy Ave., Augusta, Maine valued at $44,000.

15. Since September 8, 1984, the Defendant has paid the Plaintiff $3,155.39 in alimony and child support payments and there are arrearages of $9,900.00.

II. CONCLUSIONS OF LAW

1. There have been substantial changes in the financial circumstances of both the Plaintiff and the Defendant since the original divorce decree.

2. The Defendant's financial worth and income have substantially decreased since the original divorce decree.

3. The Plaintiff's financial worth and income have substantially increased since the original divorce decree.

4. The decline in the Defendant's financial circumstances have negatively affected his ability to pay alimony and child support.

5. The improvement in the Plaintiff's financial circumstances have reduced her need and the financial

necessity for alimony.

6. The present needs and resources of the parties require permanent reduction of the Defendant's alimony obligation to $50 per week.

7. The present needs and resources of the parties require permanent reduction of the Defendant's child support obligation to $50 per week per child.

8. Defendant filed his first Motion to Amend shortly after his employment was terminated. At that time the defendant possessed the assets and the ability to make payments in the court-ordered amounts, although he refused to do so reluctantly and engaged in what might be considered to be dilatory tactics. Based on the evidence, there should not be a reduction retroactive to the first Motion to Amend, filed on October 10, 1984. As of that date, the change in the parties' financial situations was not sufficiently

substantial to warrant a reduction in the levels of alimony and support payments. However, the Court does find that from the date of the Defendant's second Motion to Amend, filed on December 28, 1984, there has been a substantial change in the parties' financial situations. Therefore, in light of these changes, it is appropriate that modification of the original alimony and child support awards be made retroactive to December 28, 1984.

II. MOTION FOR CONTEMPT

With respect to the Plaintiff's Motion for Contempt for failure to pay child support and alimony, this Court finds:

1. As a result of a judgment of this Court, the Defendant was ordered to pay to the Plaintiff child support and alimony in the amount of $210 per week.

2. The Defendant failed to make the

required payments for the period of September 8, 1984 to December 28, 1985.

3. At the time that the payments which have not been made were due, the Defendant had the ability to make those payments as indicated in the Court's Findings of Facts.

4. As of December 28, 1985, the Defendant was $9,900 [1] in arrears in payments required by this Court.

5. Defendant has failed to comply with the terms of the Court's prior order regarding child support and alimony.

6. Defendant has the ability to make those payments and to pay the amount of arrearages.

Therefore, because it is not the Defendant's perogative to arbitrarily and unilaterally reduce the amount of alimony and child support payments without benefit of a court order, and because the Defendant had the assets to make the

payments, the Court finds that the Defendant is in contempt of this Court.

The Court ORDERS and the entry shall be:

1. Defendant's Motion to amend Divorce Judgment is GRANTED; the divorce judgment dated April 24, 1984 is permanently amended to require the Defendant to pay child support in the amount of $50 per child per week and alimony in the amount of $50 per week, retroactive to December 28, 1984.

2. Plaintiff's Motion for Contempt is GRANTED; judgment for the Plaintiff on the unpaid arrearage in the amount of $9,900. If the defendant has not paid this sum within 30 days of the date of this order, the defendant shall be

incarcerated in the Kennebec County Jail until he purges himself of the contempt by making payment in full.

3. Plaintiff's Motion for Counsel Fees is DENIED.

Dated: January 24, 1986

/s/ Morton A. Brody
MORTON A. BRODY
Justice, Superior Court

[1] This figure was stipulated to by the parties at the January 2, 1986 hearing.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-82-317

SHEILA H. FINN,

Plaintiff

vs.

ORDER

JOHN J. FINN,

Defendant

This matter is before the Court on Defendant's Motion for Stay Pending Appeal and Defendant's Motion to Amend Findings of Fact and to Make Additional Findings of Fact. The parties appeared for a hearing before this Court on February 10, 1986.

With respect to the Defendant's Motion to Amend, the Court has set forth findings of fact and conclusions of law which provide ample support for the Court's actions. The Court is not persuaded that further findings are necessary or appropriate.

The Defendant has not submitted persuasive reasons as to why the Court's Order entered on January 24, 1986 should be stayed. In view of the fact that actions relating to the care, custody, and support of minor children may not be stayed absent sufficient evidence to support such an order, Defendant's Motion for Stay must be denied.

Therefore, the Order is and the entry shall be:

1. Defendant's Motion to Amend Findings of Fact and to Make Additional Findings of Fact is DENIED.

2. Defendant's Motion for Stay Pending Appeal is DENIED.

Dated: February 10, 1986

/s/ Morton A. Brody
MORTON A. BRODY
Justice, Superior Court

STATE OF MAINE
Kennebec, ss.

SUPERIOR COURT
Civil Action,
Docket No. CV-82-317

SHEILA H. FINN,

Plaintiff

vs.

JOHN J. FINN,

Defendant

ORDER FOR MOTION ON INCARCERATION

Hearing having been held on April 3, 1986 on Motion for Incarceration of John J. Finn, the Court orders as follows:

1. On Decision and Order of January 24, 1986 by this Court, the Defendant was ordered to pay the Plaintiff Nine Thousand Nine Hundred ($9,900.00) Dollars. That Order further provided failure to pay said Nine Thousand Nine Hundred ($9,900.00) Dollars within thirty (30) days from the date of the Court Order would cause the Defendant to be incarcerated in the Kennebec County Jail until he purged himself of contempt by making payment full.

2. There is now pending escrow funds in the amount of Two Thousand Nine Hundred Sixty-three ($2,963.34) Dollars and thirty-four cents which is now ordered to be turned over to the Plaintiff and the Defendant is to be given credit for the same towards said Nine Thousand Nine Hundred ($9,900.00) Dollars.

3. The Defendant claims a retroactive credit of One Thousand Nine Hundred Twenty ($1,920.00) Dollars under the Court Order of January 24, 1986. The credit herein given for the said One Thousand Nine Hundred Twenty ($1,920.00) Dollars to the Defendant is without prejudice to the Plaintiff to contest the validity of said credit in a later Court Proceeding.

4. The Defendant having failed to pay over to the Plaintiff the balance due of Five Thousand Sixteen ($5,016.66) Dollars and Sixty-six cents, the Defendant is herein incarcerated in the Kennebec

County Jail until he purges himself of the same by payment of said Five Thousand Sixteen ($5,016.66) Dollars and Sixty-six cents.

Dated: April 3, 1986

/s/ Morton Brody
Justice Morton Brody

Upon payment of said Five Thousand Sixteen ($5,016.66) Dollars and Sixty-six cents, the Defendant is discharged forthwith from the Kennebec County Jail.

Dated: April 4, 1986

/s/ Morton Brody
Justice Morton Brody

SHEILA H. FINN

v.

JOHN J. FINN

Supreme Judicial Court of Maine

Argued, Sept. 10, 1986
Decided Nov. 3, 1986

Before McKUSICK, C.J., and
NICHOLS, ROBERTS, GLASSMAN
and CLIFFORD, JJ.

GLASSMAN, Justice

John J. Finn, the defendant in the divorce action, appeals from a judgment of the Superior Court, Kennebec County, entered on its order granting the defendant's motion to amend divorce judgment and granting the plaintiff's motion to hold the defendant in contempt for nonpayment of child support and alimony as required by the judgment of divorce. He contends that the court abused its discretion in its order for his payment of child support and alimony and

remanded it to the Superior Court with instructions to consider what modification was justified by changes of circumstance from the date of the divorce. Finn v. Finn, 499 A.2d 1234 (Me.1985). On remand the Superior Court reduced the defendant's child support obligations to $50 a week for each child and reduced the alimony to $50 a week, retroactive to the filing date of the second motion to amend. Acting on plaintiff's motion, the court also found the defendant in contempt for nonpayment of a stipulated amount of arrearages in alimony and child support. We denied the defendant's motion for a stay of the judgment pending appeal. The defendant later purged himself of contempt by full payment of the amount of the arrearages.

I

The defendant asserts that the record and findings do not support the judgment

by finding him in contempt for noncompliance with the original divorce judgment; that the denial of a stay of execution of the order pending appeal deprived him of the equal protection of the laws; and that the justice who entered the original judgment of divorce lacked authority to do so. We find no merit in these contentions and affirm the judgment.

Finn did not appeal the judgment of divorce in this case entered by the Superior Court on April 24, 1984, requiring the defendant to pay to the plaintiff $70 a week in child support for each of their two children and $70 a week alimony. He later sought to reduce the alimny and child support payments by filing two motions to modify the divorce judgment, the first on October 10, 1984 and the second on December 28, 1984. On appeal from the judgment denying the first motion, this court vacated the order and

modifying the amount of alimony and child support he is to pay to the plaintiff. Emphasizing the static economic circumstances of the parties at the time of the hearing on remand, the defendant contends that he should pay nothing. Our review of the Superior Court's determination is quite limited.

> "The plurality of considerations involved in evaluating a motion for modification requires that the Law Court accord unusual deference to the findings of the trial court.
>
> > "...Absent a violation of some positive rule of law, this Court will overturn the trial court's decision of such a question only if it results in a plain and unmistakable injustice, so apparent that it is instantly visible without argument."

Williams v. Williams, 444 A.2d 977, 980 (Me.1982) (quoting Smith v. Smith, 419 A.2d 1035, 1038 (Me.1980)).

(1) The findings support the judgment. The Superior Court was not limited to consideration of economic circumstances of the parties on the day of

the hearing. The court properly considered the defendant's earning capacity, future prospects and ability to pay. Bryant v. Bryant, 411 A.2d 391, 395 (Me.1980); Pendexter v. Pendexter, 363 A.2d 743, 750 (Me.1976); Schuler v. Schuler, 382 Mass. 366, 416 N.E.2d 197, 203 (1981); 19 M.R.S.A. Sec. 721 (1981). The court noted the defendant's previous annual salary of $40,000 and found that the defendant could increase his efforts to find full-time employment. Given these findings the judgment for child support and alimony was not manifestly unjust. We need not address the defendant's contention that the judgment resulted from gender discrimination by the Superior Court.

(2) The defendant also maintains that the reduction of payments should have been made retroactive to the date of the filing of his first motion to amend, rather than

the second. Whether a modification decree should be made retroactive to the date of filing of the application for modification is a matter left to the sound discretion of the divorce court. Wood v. Wood, 407 A.2d 282, 288 (Me.1979). The court found that when the defendant filed his first motion on October 10, 1984, the change in the parties' finances was not sufficiently substantial to warrant a reduction in payments, but by the time of the filing of his second motion, on December 28, 1984, substantial change warranted a reduction retroactive to that date.

The partial retroactivity was within the trial court's discretion. At the time of the filing of the first motion the defendant had been unemployed for only one month. It was the trial court's task to decide when the relative financial conditions of the parties were substantially changed. See Smith v. Smith, 419 A.2d

1035, 1037 (Me.1980). On this record the effective date for the retroactive modification of the divorce judgment did not result in "a plain and unmistakable injustice" to the defendant. Id. at 1038.

II

(3) The defendant also seeks to appeal from the Superior Court's finding and civil contempt commitment for nonpayment of the stipulated amount owed in arrearages for alimony and child support. The defendant does not challenge the stipulated amount owed, but claims he was unable to pay that amount. We have previously stated that "(j)usticiability requires that there be a real and substantial controversy, admitting of specific relief through a judgment...." Connors v. International Harvester Credit Corp., 447 A.2d 822, 824 (Me.1982). By payment of the amount of the arrearages, the defendant totally purged his contempt.

The now purged adjudication of contempt carries no possibility of collateral consequences to the defendant. Matter of Establish Inspection of the Metal Bank of America, Inc., 700 F.2d 910, 913 (3d Cir.1983). Because on the facts of this case no actual, affirmative relief can be granted, the defendant has not presented a justiciable issue for our determination.

III

(4) The defendant maintains that because Maine Rule of Civil Procedure 62(a) discriminates against men, he was unconstitutionally denied a stay of the Superior Court's order pending appeal. The denial of the defendant's motion for stay filed prior to a notice of appeal was by order of the Superior Court, not by automatic operation of Rule 62(a), which governs the effect of a judgment providing for child support or alimony "unless otherwise ordered by the court...." Fol-

lowing the filing of his notice of appeal, the defendant filed a motion for stay of execution before this court which was denied. See M.R.Civ.P. 75B9(a) and (c) and 62(g). Given the defendant's compliance with the Superior Court order, this question also fails to present a justificable issue for our determination.

IV

(5) Finally, the defendant challenges the authority of the associate justice of the Supreme Judicial Court who presided over the divorce trial. Defendant concedes that the Chief Justice of the Supreme Court assigned the presiding justice to the Superior Court. The assignment was an exercise of the Chief Justice's power under 4 M.R.S.A. Sec. 101 (Supp.1985). The assignee justice, sitting as a Superior Court justice, had authority to preside at the trial of the action for divorce. See 19 M.R.S.A. Sec.

664 (1981).

The entry is:

Judgment affirmed.

All concurring.

1. Several federal cases have held challenges to previously purged contempt citations moot. See, e.g., McDonald's Corp. v. Victory Inv., 727 F.2d 82, 85-86 (3d Cir.1984); Spangler v. Pasadena City Bd. of Educ., 537 F.2d 1031, 1032(9th Cir.1976); United States v. Watson Chapel School Dist. No. 24, 446 F.2d 933, 939 (8th Cir. 1971), cert. denied, 404 U.S. 1059, 92 S.Ct. 739, 30 L.Ed.2d 747 (1972). But see Wilson v. Superior Court, 31 Cal.2d 458, 189 P.2d 266 (1948) (payment under legal compulsion does not preclude review on certiorari to determine if trial court exceeded its jurisdiction in making contempt order for nonpayment of alimony alleged due).